

NEW SECTION

WAC 296-14-4121 What does the term "willful misrepresentation" mean with regard to the receipt of workers' compensation benefits? This term is found in RCW 51.32.240(5) which provides a fifty percent penalty, in addition to any overpayment, whenever any payment of benefits has been induced by "willful misrepresentation." The law goes on to state that it is willful misrepresentation for a person to obtain payments or other benefits in an amount greater than that to which he or she would have otherwise been entitled. Willful misrepresentation includes making a willful false statement or the willful misrepresentation, omission, or concealment of any material fact.

(1) Willful means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing workers' compensation benefits. Failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(2) The assessment of the fifty percent penalty does not apply to those instances where the misrepresentation is not willful, as defined above. For example, a worker receives wages at the time of injury of \$10.25 per hour, but he inadvertently indicates on the report of industrial injury or occupational disease that his pay is \$10.75 per hour. The state fund employer fails to submit a completed report form and the time-loss compensation benefit rate is based on wages of \$10.75 per hour. When this information is provided to the employer, worker, and medical provider by legal order, no interested party submits a protest within the statutory time frame, but further investigation later reveals the misinformation. An overpayment determination under RCW 51.32.240(1) may be appropriate upon discovery of the correct hourly pay rate, but the worker has not engaged in willful misrepresentation with specific intent to obtain benefits to which he would have otherwise not been entitled.

NEW SECTION

WAC 296-14-4122 For purposes of determining willful misrepresentation, what does the term "specific intent" mean? "Specific intent" means the commission of an act or the omission of information with the knowledge that such an act or omission will lead to wrongfully obtaining benefits. For example, a worker who completes a document knowingly misrepresenting that he/she is unable to perform work or work-type activities has committed an act. Submitting this document to the department or self-insurer in order to wrongfully receive workers' compensation benefits under Title 51 RCW represents specific intent.

Examples of the omission of information with the intent of obtaining benefits include, but are not limited to, failure of the worker to advise the department or self-insurer of a return to work or of self-employment; or failure to provide the department or self-insurer with complete information about skills and abilities that would have changed the outcome of a vocational assessment or the department's decision to provide vocational services. Not providing this information to the department or self-insurer represents specific intent because the omission of it can cause continued workers' compensation benefits to which the worker would not have been entitled had the information been provided.

The following is an example of a situation that does not represent "specific intent": An injured worker's wife is hired to manage the mobile home park where they live. Wages were paid to her for the management duties. The injured worker would occasionally answer the telephone when his wife was not available and he opened and closed the park gates each morning. He did not engage in the maintenance work of the park, provide tours of the park to prospective customers or perform any other park management duties. The worker did not report this activity to the department, his physician or his vocational counselor. The worker's omission of information is not considered "willful misrepresentation" with "specific intent" to receive benefits to which he would not be otherwise entitled.

NEW SECTION

WAC 296-14-4123 What is meant by "work-type activity"?

(1) Work-type activity means any activity for which a reasonable person would expect to be compensated or for which a reasonable employer would expect to pay compensation.

(2) Work-type activity does not mean exploration of a job for a short period of time to determine whether the worker can do the job so long as:

(a) The worker does not receive wages, income, or anything of value; and

(b) The worker or his/her family has no financial interest in or benefits from the worker's job exploration.

Activity done intermittently or as a hobby that does not generate income will not generally rise to the level of repeated work-type activity.

For example, a worker who is receiving wage replacement benefits volunteers two hours each day for a recognized charity greeting customers and operating the cash register. His treating physician is aware of this activity and encourages it to keep him more active, but does not release him to work or to perform this function more than two hours daily. The worker does not initially inform the department of his activity because he receives no compensation and would not expect to. The department learns of the volunteer work when the worker completes a worker verification form indicating the volunteer activity. No willful misrepresentation of a work-type activity has occurred in this case.

NEW SECTION

WAC 296-14-4124 What are considered as "wage replacement benefits"? Wage replacement benefits include temporary total disability (time-loss compensation benefits), temporary partial disability (loss-of-earning power benefits), and total permanent disability or survivor benefits (pension).

NEW SECTION

WAC 296-14-4125 How does the department calculate the amount of overpayment charged to a claimant when a determination of "willful misrepresentation" has been made in initial claim adjudication? Overpayments are assessed in cases where there has been willful misrepresentation.

When it is determined that a claim was initially accepted as an industrial injury or occupational disease based on willful misrepresentation, the overpayment calculation includes all wage replacement benefits, permanent partial disability benefits, medical benefits, vocational benefits, and other medical aid fund benefits paid on the claim.

NEW SECTION

WAC 296-14-4126 How does the department calculate the amount of overpayment charged to a claimant when a determination of "willful misrepresentation" has been made after initial claim adjudication? (1) Overpayments are assessed in cases where there has been willful misrepresentation. The overpayment calculation in these claims includes all or part of wage replacement benefits and may include permanent partial disability benefits, vocational, medical benefits, and/or other medical aid fund benefits paid on the claim for the period as described below.

(a) The period of overpayment will begin with either the first date of willful misrepresentation or the first date of the repeated pattern of work or work-type activities.

(b) Medical benefits: Medical benefits paid on a claim may be included when a treating physician's opinion of the need for further treatment related to the claim, or his/her opinion of a condition's maximum medical improvement was changed by the willful misrepresentation. Only those medical services to which the worker would not have been otherwise entitled are included in the overpayment.

(c) Vocational benefits: Vocational benefits may be included when it is determined, because of the willful misrepresentation, that the vocational services would not have been provided but for the misrepresentation.

(d) Permanent partial disability benefits: Permanent

partial disability benefits will be included when the worker's willful misrepresentation results in the receipt of permanent partial disability benefits to which the worker would not otherwise have been entitled.

(e) Other medical aid fund benefits: Other medical aid fund benefits may be included such as travel and lodging.

(f) Wage replacement benefits:

(i) The overpayment will include all of the wage replacement benefits resulting from willful misrepresentation when the worker has:

(A) Misrepresented his/her physical restrictions or engaged in a repeated pattern of work or work-type activities; and

(B) The worker would have been released by a physician to return to the job of injury had the repeated pattern of work or work-type activities been disclosed. In cases where a treating physician is unwilling or unable to render an opinion in this situation, the opinion of a consulting physician or independent medical examiner may be used; or

(C) In the case of total permanent disability benefits, the work or work-type activity is such that the imputed wages are equivalent to gainful employment; or

(D) In the case of survivor benefits, the willful misrepresentation was such that the beneficiary would not have been entitled to benefits were it not for the misrepresentation.

(ii) The overpayment will include all or part of the wage replacement benefits to which the worker would not otherwise have been entitled were it not for the repeated pattern of work or work-type activities when the worker has:

(A) Misrepresented his/her physical restrictions or has engaged in a repeated pattern of work or work-type activities; and

(B) The department would have determined that the worker returned to work; or

(C) A vocational counselor would have determined that the worker was employable in accordance with department rules.

(2) In cases, other than pension, when the wages or imputed wages are less than the total wage at the time of injury, the wage replacement portion of the overpayment equals the wage replacement benefit paid less the entitled loss-of-earning power benefits. However, this reduction will cease either the date the department had evidence of or a physician would have determined the worker had reached maximum medical improvement (MMI) had the repeated pattern of work or work-type activity been disclosed. In cases where a treating physician is unwilling or unable to render an opinion in this situation, the opinion of a consulting physician or independent medical examiner may be used. From that date forward, the wage replacement portion of the overpayment includes all wage replacement benefits paid.

NEW SECTION

WAC 296-14-4127 How are penalties determined? As provided in RCW 51.32.240, the penalties equal fifty percent of the total overpayment amount.

NEW SECTION

WAC 296-14-4128 When may the department impute wages in cases where willful misrepresentation has been determined? The department may impute wages when:

- ✎ The worker is self-employed; or
- ✎ Appropriate payroll records are not available; or
- ✎ The employer is paying the worker in cash or material without maintaining appropriate payroll records; or
- ✎ There is no employer but the worker has engaged in a repeated pattern of work-type activities or has willfully misrepresented his or her physical restrictions.

NEW SECTION

WAC 296-14-4129 How will imputed wages be determined? (1) When the worker has performed work or work-type activities within the state of Washington, the department imputes wages based on information collected and reported by the department of employment security. This information may include wages for the same or similar jobs within the geographic area proximate to the worker and for the same or most proximate time period as the work or work-type activities performed.

(2) When the worker performed work or work-type activities outside the state of Washington for which wages are to be imputed, the department will use information collected and reported by the United States Department of Labor Statistics to determine the correct imputed wage.

(3) In no case shall the imputed wages equal less than the hourly minimum wage for the proximate time period and geographic area used.

(4) If the worker engaged in reduced work or work-type activities when compared to the employment at the time of injury, except in pension cases, the department shall calculate the loss-of-earning power benefits consistent with RCW 51.32.090(3) to which the worker would have been entitled based on the imputed wage.

Example of imputed wage: A worker received time-loss compensation benefits and contended he was unable to work in his regular job as a construction laborer. Investigation showed that he was working painting houses on a regular full-time basis. The work he performed was ongoing over an extended period of time. Payments for this work were reportedly on a cash basis and no records were kept.

Wages would be imputed based on the average wage of a painter in his local area as reported by the department of employment security.

Example of reduced work or work-type activity: A worker was receiving time-loss compensation benefits for a shoulder injury she suffered while working as a registered nurse. She contended she was unable to perform nursing duties. The department received evidence that she had in fact been working on a regular basis as a cashier in her husband's delicatessen. There were no wages reported for this work. The evidence also showed she had worked there for several months.

The medical and vocational providers were shown the investigative evidence and they determined the worker was able to work and had returned to work as a cashier.

The department would impute wages based on the average wage paid by the business owner to other employees in the same position. If there were no other employees, wages would be imputed based on the average wage of a cashier in the local area as reported by the department of employment security.

Example of release for work and no imputed wage: A worker, who was a carpenter on the date of injury, was receiving time-loss compensation benefits based on his alleged inability to return to work. He contended he had to use a wheelchair to get around.

Video evidence was obtained showing him performing extensive remodeling work on a rental home he owned. He did not use the wheelchair and there was no indication he had any difficulties performing the work. His activities included installing siding and windows, painting, and performing other activities inconsistent with his alleged level of disability. He received no wages as the work was done on his personal property.

The video was shown to his attending physician. The physician withdrew his certification of the worker's entitlement to time-loss compensation benefits and released him to return to work at his job of injury effective the first date of the video

surveillance.

There is no need to impute wages because the release for work was to the job of injury.